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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Big Bear Import Brokers, Inc. d/b/a ) No. CV-08-2256-PHX-DGC  
10 Glow Machine, an Arizona corporation, )  
11 Plaintiff, ) **ORDER**  
12 vs. )  
13 LAI Game Sales, Inc., et al., )  
14 Defendants. )

15 Plaintiff Big Bear Import Brokers, Inc. has filed a motion for partial summary  
16 judgment. Dkt. #37. Defendant LAI Game Sales, Inc. has filed a motion for summary  
17 judgment. Dkt. #33. Both motions are fully briefed. Dkt. ##41, 43, 35, 39. For reasons that  
18 follow, the Court will deny Big Bear's motion for partial summary judgment (Dkt. #37) and  
19 grant in part and deny in part LAI's motion for summary judgment (Dkt. #33).<sup>1</sup>

20 **I. Background.**

21 LAI is a manufacturer, promoter, and seller of gaming machines. Big Bear is a  
22 manufacturer and seller of arcade-type games. In April of 2008, a sales representative from  
23 LAI, Chad Hughes, met the president of Big Bear, Aaron Pelto, at a trade show. Dkt. #37  
24 at 2. Pelto and Hughes had several meetings and conversations about the possibility of Big  
25 Bear becoming a distributor of one of LAI's most popular gaming machines – the "Stacker."

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27 <sup>1</sup> Big Bear's request for oral argument is denied. The parties have fully briefed the issues and  
28 oral argument will not aid the Court's decision. *See Lake at Las Vegas Investors Group, Inc.*  
*v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991).

1 Dkt. #33 at 3; Dkt. #35 at 3. At the end of the trade show, Hughes gave Pelto a Stacker  
2 distributor price sheet and, after the trade show, Pelto flew to Texas to meet with Hughes to  
3 further discuss Big Bear becoming a distributor. Dkt. #35 at 4. The two came to an informal  
4 agreement and Hughes asked Pelto to prepare a contract (the “Purchase Contract”). *Id.* Pelto  
5 drafted the Purchase Contract and sent it to Hughes, who signed it and sent a copy back to  
6 Pelto. *Id.*

7 After receiving the signed Purchase Contract, Big Bear undertook preparation to begin  
8 distributing Stacker machines, which, according to Big Bear, resulted in substantial costs.  
9 Dkt. #37 at 4. On May 1, 2008, Big Bear placed an order for 20 Stacker machines, which  
10 LAI filled. Dkt. #33 at 4. Only a few months after sending the Stacker machines to Big  
11 Bear, however, LAI was “inundated with minor service and set up issues on some of the  
12 games purchased by Big Bear’s few existing customers.” *Id.* According to LAI, for that and  
13 other reasons, it informed Big Bear in July that it would not sell it more Stacker machines.  
14 *Id.* Soon after, LAI learned of the Purchase Contract that had been signed between Hughes  
15 and Big Bear. *Id.* at 5. LAI reaffirmed that it would supply no additional machines, and on  
16 October 8, 2008, Big Bear filed this lawsuit in state court, alleging breach of contract, breach  
17 of the covenant of good faith and fair dealing, and promissory estoppel. Dkt. #1. LAI  
18 removed the case to this Court on the basis of diversity jurisdiction. Dkt. #1.

## 19 **II. Legal Standard.**

20 A court must grant summary judgment if the pleadings and supporting documents,  
21 viewed in the light most favorable to the nonmoving party, “show that there is no genuine  
22 issue as to any material fact and that the moving party is entitled to judgment as a matter of  
23 law.” Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986);  
24 *Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law  
25 determines which facts are material, and “[o]nly disputes over facts that might affect the  
26 outcome of the suit under the governing law will properly preclude the entry of summary  
27 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see Jesinger*, 24 F.3d  
28 at 1130. In addition, the dispute must be genuine, that is, the evidence must be “such that a

1 reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

2 A principal purpose of summary judgment is “to isolate and dispose of factually  
3 unsupported claims.” *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate  
4 against a party who “fails to make a showing sufficient to establish the existence of an  
5 element essential to that party’s case, and on which that party will bear the burden of proof  
6 at trial.” *Id.* at 322; *see Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir. 1994).  
7 The moving party need not disprove matters on which the opponent has the burden of proof  
8 at trial. *Celotex*, 477 U.S. at 323.

### 9 **III. Analysis.**

10 LAI has moved for summary judgment on all claims. Big Bear has moved for  
11 summary judgment on the breach of contract claim. The Court will grant summary judgment  
12 to LAI on the breach of contract claim and the breach of implied covenant claim and will  
13 deny it as to the promissory estoppel claim and damages.

#### 14 **A. Breach of Contract.**

15 To prevail on a breach of contract claim, a plaintiff must prove the existence of a  
16 contract between the plaintiff and the defendant, a breach of the contract by the defendant,  
17 and resulting damage to the plaintiff. *See Coleman v. Watts*, 87 F. Supp. 2d 944, 955 (D.  
18 Ariz. 1998) (citing *Clark v. Compania Ganadera de Cananea, S.A.*, 387 P.2d 235, 237 (Ariz.  
19 1963)). LAI asserts that the parties did not have an enforceable contract because  
20 (1) Hughes, as a mere employee, had no authority to form the Purchase Contract on LAI’s  
21 behalf, (2) Big Bear provided no consideration, (3) the contract is barred by the statute of  
22 frauds, and (4) the Purchase Contract is unconscionable. Big Bear seeks summary judgment  
23 on its breach of contract claim because (1) Hughes had authority to enter the Purchase  
24 Contract, (2) LAI ratified the Purchase Contract, and (3) LAI breached the Purchase  
25 Contract. The Court agrees that Big Bear provided no consideration for the Purchase  
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1 Contract and that, as a result, there was no valid contract between LAI and Big Bear.<sup>2</sup>

2 To be enforceable, a contract must have adequate consideration and specification of  
3 terms so that the obligations of each party can be ascertained. *Rogus v. Lords*, 804 P.2d 133,  
4 135 (Ariz. App. 1991). Mutuality of obligation is required and, significantly for this case,  
5 “is absent when only one of the contracting parties is bound to perform.” *Carroll v. Lee*, 712  
6 P.2d 923, 926 (Ariz. 1986). “Parties are, within reason, free to contract as they please, and  
7 to make bargains which place one party at a disadvantage; but a contract must have mutuality  
8 of obligation, and an agreement which permits one party to withdraw at his pleasure is  
9 void.” *Shattuck v. Precision-Toyota, Inc.*, 566 P.2d 1332, 1334 (Ariz. 1977) (quoting *Naify*  
10 *v. Pac. Indem. Co.*, 76 P.2d 663, 667 (Cal. 1938), and citing *Eaton Factors Company, Inc.*  
11 *v. Bartlett*, 24 Conn.Sup. 40, 42-43, 186 A.2d 166, 168 (1962) (“[T]o agree to do something  
12 and to reserve the right to cancel the agreement at will is no agreement at all[.]”) (quotation  
13 omitted)).<sup>3</sup>

14 The Purchase Contract did not obligate Big Bear to render any performance. Instead,  
15 Big Bear could withdraw from the contract at any time, for any reason, and never purchase  
16 Stacker machines at all. See Dkt. #42-1 at 3-4 (“[Big Bear] may terminate this Contract at  
17 any time by providing written notice of termination,” but LAI can terminate only for  
18 insolvency, fraud, assignment, or bankruptcy.). As a result, the Purchase Contract is illusory  
19 and void. *Shattuck*, 566 P.2d at 1334 (“[A]n agreement which permits one party to withdraw  
20 at his pleasure is void.”).

21 Big Bear argues that the Court should interpret the contract as a valid requirements  
22 contract which obligated it to buy its requirement of Stacker machines from LAI for a period

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24 <sup>2</sup> Because the Court agrees that there was no consideration for the Purchase Contract, the  
25 Court will not consider the other arguments by Big Bear and LAI.

26 <sup>3</sup> Big Bear does not disagree with this principle of law. Instead, Big Bear relies heavily on  
27 this Court’s decision in *AGA Shareholders, LLC v. CSK Auto, Inc.*, 589 F. Supp. 2d 1175 (D.  
28 Ariz. 2008), to argue that the Purchase Contract language and extrinsic evidence combine  
to show a five-year requirements contract. *AGA Shareholders* will be discussed below.

1 five years. Dkt. #35 at 9. “Interpretation of a contract is a question of law for the court when  
2 its terms are unambiguous on its face.” *Ash v. Egar*, 541 P.2d 398, 401 (Ariz. App. 1975).  
3 Under Arizona law, the Court should consider any relevant extrinsic “evidence and, if . . .  
4 the contract language is ‘reasonably susceptible’ to the interpretation asserted by its  
5 proponent, the evidence is admissible to determine the meaning intended by the parties.”  
6 *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1140 (Ariz. 1993).

7       The Purchase Contract in this case is not reasonably susceptible to the interpretation  
8 asserted by Big Bear – that Big Bear could not cancel at will, but instead was bound to a five-  
9 year requirements contract. Although the contract does state that it “shall remain in force for  
10 five (5) years,” it immediately qualifies this term by stating “unless sooner terminated as  
11 provided herein.” Dkt. #42-1 at 3. The next paragraph provides that “[Big Bear] may  
12 terminate this Contract at any time by providing written notice of termination.” *Id.* The  
13 extrinsic evidence put forward by Big Bear – that its purpose in entering the agreement was  
14 to become a distributor for LAI, that it would not have ordered LAI’s machines unless it had  
15 such an agreement, that it only intended to purchase products from LAI, and that LAI  
16 intended that Big Bear become a new distributor – does not alter the plain language that  
17 empowered Big Bear to terminate the contract at any time, for any reason. Dkt #35 at 11-12.  
18 And because that plain language is not susceptible to an interpretation that in effect reads it  
19 out of existence, the contract gave Big Bear the right to terminate at will and therefore is  
20 invalid under Arizona law. *Shattuck*, 566 P.2d at 1334 (“[A]n agreement which permits one  
21 party to withdraw at his pleasure is void.”).

22       Big Bear relies heavily on this Court’s decision in *AGA Shareholders*, 589 F. Supp.  
23 2d 1175. The decision in *AGA* looked to the language of the AGA-CSK contract, extrinsic  
24 evidence of the parties’ intent, and the parties’ course of dealing before and after the contract  
25 was signed to hold that the contract was a valid five-year requirements contract. These  
26 factors made clear that the parties intended a contract in which CSK would purchase all of  
27 its requirements from AGA for a five-year period. *Id.* at 1180-85. Significantly, the contract  
28 language in *AGA* was susceptible to this interpretation. *Id.* at 1184 (“the language used in

1 the Agreement adequately reflects the requirements nature of the contract”). Indeed, the  
2 Court recognized that extrinsic evidence of the parties’ intent is relevant only if “the  
3 contract language is “reasonably susceptible” to the interpretation asserted by its  
4 proponent[.]” *Id.* at 1181 (quoting *Taylor*, 854 P.2d at 1140). The contract in *AGA* did not  
5 provide that one party could terminate at will, and the litigants never argued that the contract  
6 was void for lack of consideration under *Shattuck*, 566 P.2d at 1334. *AGA* thus did not  
7 address the issue raised in this case.

8 The Court concludes that the clear and unambiguous language of the Purchase  
9 Contract empowered Big Bear to cancel the contract at will. The language of the contract  
10 simply is not susceptible to the contrary interpretation – that Big Bear could not terminate  
11 the contract at will. Because such a provision renders the contract void under Arizona law,  
12 Big Bear may not prevail on its breach of contract claim.

13 **B. Breach of the Implied Covenant.**

14 LAI contends that it is entitled to summary judgment on this claim because there was  
15 no valid contract. The Court agrees. The implied covenant of good faith and fair dealing  
16 cannot be breached if the parties did not enter into a valid contract. *See Wells Fargo Bank*  
17 *v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d  
18 12, 28 (Ariz. 2002). Summary judgment will be granted to LAI on this claim.

19 **C. Promissory estoppel.**

20 LAI also argues that it is entitled to summary judgment on Big Bear’s claim for  
21 promissory estoppel. To prevail on a claim for promissory estoppel, a plaintiff must prove  
22 (1) that the defendant made a promise, (2) that it was reasonably foreseeable that the plaintiff  
23 would rely on the promise, and (3) that the plaintiff relied on the promise to his detriment.  
24 *Higginbottom v. State*, 51 P.3d 972, 977 (Ariz. App. 2002). LAI claims that Big Bear cannot  
25 prevail on a claim for promissory estoppel because LAI made no promise – only Hughes  
26 made a promise, and he had no authority to act on behalf of LAI. Dkt. #33 at 13. Big Bear  
27 contends that Hughes had authority to act on behalf of LAI and, in any event, the question  
28 is one of fact for the trier of fact at trial.

1 Under Arizona law, a principal is not liable for actions of an agent unless the actions  
2 are based on one of two kinds of authority: actual authority or apparent authority. *O.S.*  
3 *Stapley Co. v. Logan*, 431 P.2d 910, 913 (Ariz. App. 1967). Generally, for an agent to have  
4 actual authority to act on a principal's behalf, the principal must have given explicit  
5 permission to the agent. *Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 161 P.3d 1253, 1261  
6 (Ariz. App. 2008). Hughes did not have actual authority to enter the Purchase Contract on  
7 behalf of LAI.

8 Actual authority can be proven in two ways (1) through express authority in which a  
9 "principal has stated in very specific or detailed language" that an agent has authority, or  
10 (2) through implied authority in which an agent has authority "to act in a manner in which  
11 an agent believes the principal wishes the agent to act based on the agent's reasonable  
12 interpretation of the principal's manifestations." *Ruesga*, 161 P.3d at 1261 (quoting  
13 Restatement (Third) of Agency § 2.01 cmt. b). LAI has provided undisputed evidence that  
14 Hughes did not have authority to enter into the Purchase Contract and that, at the time he  
15 signed it, he knew he did not have such authority. Dkt. #42-1 at 55-56 (Hughes admitting  
16 he had a feeling that he was not allowed to enter the purchase agreement). Because Big Bear  
17 has the burden of showing actual authority and has presented no evidence of such authority,  
18 the Court finds that Hughes did not have actual authority. *Celotex*, 477 U.S. at 322.

19 The Court cannot reach the same conclusion with respect to apparent authority. When  
20 a "principal has intentionally or inadvertently induced third persons to believe that . . . a  
21 person was its agent although no actual or express authority was conferred on him as agent,"  
22 apparent authority exists. *Ruesga*, 161 P.3d at 1261. To show apparent authority, Big Bear  
23 must show (1) that LAI engaged in conduct that led Big Bear to believe that Hughes had  
24 apparent authority to enter the Purchase Contract, and (2) that Big Bear's reliance on the  
25 apparent authority was reasonable. *Anchor Equities, Ltd. v. Joya*, 773 P.2d 1022, 1025-26  
26 (Ariz. App. 1989).

27 Big Bear has presented evidence that LAI hired Hughes as a Regional Sales Manager  
28 to sell games, sent Hughes to the trade show where he met Pelto, and identified him with a

1 booth decorated with LAI's logo, LAI clothing, and a nametag to market and promote LAI  
2 games. Dkt. #35 at 7-8. Big Bear contends that these actions by LAI made it reasonable for  
3 Big Bear to believe that Hughes had authority to enter into the Purchase Contract. Although  
4 these facts are not in dispute, the inferences to be drawn from them are hotly contested. Big  
5 Bear argues that its president met LAI's Regional Sales Manager and United States Sales  
6 Manager at a trade show and discussed the possibility of Big Bear becoming a distributor.  
7 The Regional Sales Manager gave Pelto a price sheet and invited Pelto to LAI's Texas office  
8 to discuss the agreement further. From what Pelto saw, Hughes as a salesman was authorized  
9 to enter into a sales contract on behalf of LAI. In contrast, LAI argues that it merely sent a  
10 newly-hired sales representative to a trade show to stand at a booth that could have been  
11 staffed by a model or a child, that the representative was so excited to make a sale that he  
12 signed a contract he knew he had no authority to sign, and that LAI, upon learning of the  
13 agreement, quickly terminated it. LAI contends that these facts provide no reasonable basis  
14 upon which Big Bear could conclude that Hughes had authority to bind LAI.

15        "In cases in which the evidence is conflicting, or susceptible to different reasonable  
16 inferences, the nature and extent of an agent's authority is a question of fact to be determined  
17 by the trier of fact. The question is one of law for the court only where different reasonable  
18 and logical inferences may not be drawn from the evidence." *First Union Nat'l Bank v.*  
19 *Brown*, 603 S.E.2d 808, 815 (N.C. App. 2004); *see also Bailey v. Worton*, 752 So.2d 470,  
20 475 (Miss. App. 2000) ("The fact finder must determine whether there is sufficient evidence  
21 to meet the . . . test for recovery under the theory of apparent authority[.]"); *John Scowcroft*  
22 *& Sons Co. v. Roselle*, 289 P.2d 621, 623 (Idaho 1955) ("Where existence of agency is  
23 disputed, it is a question of fact for the jury."); *LeBlanc v. New England Raceway, LLC*, 976  
24 A.2d 750, 759-60 (Conn. App. 2009) ("Whether apparent authority exists is a question of  
25 fact, requiring the trier of fact to evaluate the parties' conduct in light of the attenuating  
26 circumstances."). Because differing inferences regarding Hughes' apparent authority can be  
27 drawn from the facts in this case, apparent authority must be resolved at trial and cannot be  
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1 decided on summary judgment.<sup>4</sup>

2 **D. Damages.**

3 LAI contends that Big Bear cannot prove lost profits with any reasonable certainty.  
4 Dkt. #33 at 14-17. To recover lost profits damages, a plaintiff must provide evidence “to  
5 furnish a reasonably certain factual basis for computation of probable losses.” *Rancho*  
6 *Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 680 P.2d 1235, 1245 (Ariz. Ct. App. 1984). The  
7 standard is “that the existence of the profits cannot be nebulous, although there can be some  
8 uncertainty in fixing the measure or extent of those profits which certainly would exist.”  
9 *Schuldes v. Nat’l Surety Corp.*, 557 P.2d 543, 548 (Ariz. App. 1976).

10 Big Bear has submitted a Damage Report by Robert M. Semple, CPA, outlining the  
11 financial damages that he contends were sustained by Big Bear. Dkt. #36-2 at 32-44. LAI  
12 contends that this report is based on speculation because it is undisputed that Big Bear did  
13 not lose any actual orders of Stacker machines as a result of LAI’s conduct. Dkt. #33 at 15.  
14 LAI argues that the evidence of lost sales consists of phone calls made to potential customers  
15 who did not finalize sales or negotiate sale prices. *Id.* at 15. Semple, however, looked at Big  
16 Bear’s actual sales during the short period when LAI supplied it with Stackers Machines to  
17 estimate the sales that would have occurred had LAI continue supplying the machines. Dkt.  
18 #36-2 at 35-36. The Court cannot say as a matter of law that such an approach is unfounded.  
19 The trier of fact will be required to consider the reasonableness of such an approach to  
20 damages in light of all the evidence.

21 LAI contends that Big Bear cannot collect damages for losing sales of machines Big  
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23 <sup>4</sup> It is not clear that Big Bear is entitled to a jury trial on its promissory estoppel claim.  
24 Promissory estoppel is an equitable remedy. *Double AA Builders, Ltd. v. Grand State*  
25 *Constr., L.L.C.*, 114 P.3d 835, 843 (Ariz. App. 2005). Big Bear may not be entitled to a jury  
26 trial on such a claim. *See In re Estate of Newman*, 196 P.3d 863, 877 (Ariz. App. 2008). The  
27 parties should address this issue in their proposed final pretrial order. The parties should also  
28 address Restatement (Second) of Contracts § 90(1) (1981) and its statement that “[t]he  
remedy granted for breach may be limited as justice requires.” For example, the parties  
should consider whether a promissory estoppel remedy allows the recovery of lost profits,  
or should be limited to lost out-of-pocket expenses.

1 Bear was never required to purchase. In support of this argument, LAI cites to a Fifth Circuit  
2 case in which the court was applying Texas law on damages. *See Hiller v. Mfrs. Prod.*  
3 *Research Group of N. Am., Inc.*, 59 F.3d 1514 (5th Cir. 1995). It is clear, both from the  
4 contract itself and the briefs of the parties, however, that Arizona law applies here. *See*  
5 Dkt. #42-1 at 4 (“This Contract shall be governed . . . in accordance with . . . the laws of the  
6 . . . State of Arizona”).

7 LAI argues that Big Bear cannot recover lost profits that it could have prevented by  
8 cover, particularly given that there were similar goods available in the marketplace. Dkt. #33  
9 at 16. While LAI may be correct that Big Bear cannot recover for damages that could have  
10 been avoided by reasonable effort, *see Coury Bros. Ranches, Inc. v. Ellsworth*, 446 P.2d 458,  
11 463 (Ariz. 1968), the suitability of cover – replacements for the Stackers machines – is a  
12 question of fact that cannot be decided on summary judgment.

13 **IT IS ORDERED:**

- 14 1. Big Bear’s motion for partial summary judgment (Dkt. #37) is **denied**.
- 15 2. LAI’s motion for summary judgment (Dkt. #33) is **granted in part and**  
16 **denied in part**.
- 17 3. The Court will set a final pretrial conference by separate order.

18 DATED this 2nd day of March, 2010.

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David G. Campbell  
United States District Judge  
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